

C. Remarks

The claims are 1-11 and 13-18, with claim 1 being the sole independent claim. Claim 12 has been cancelled, without prejudice or disclaimer of the subject matter presented therein. Claims 1, 6 and 14 have been amended to define the Applicants' invention more clearly. In particular, claims 1 and 14 have been amended to clarify that the soft edible layer is formed of an edible layered component selected from the group consisting of peanut butter, jelly, cheese, caramel, cream cheese, cookie dough or fruit. Support for these amendments may be found, for example, in paragraph [0036] of the specification. Claim 14 has also been amended to limit the shelf stable edible snack to that obtainable by the method of claim 1, which places specific structural requirements on the product, and to clarify that the edible core is selected from the specified group. Claim 6 has been amended to conform to the description at paragraph [0034] of the specification. No new matter has been added. Reconsideration of the claims is expressly requested.

The Examiner has rejected claims 1-18 under 35 U.S.C. §112, second paragraph, as allegedly being indefinite. The grounds of rejection are respectfully traversed.

In particular, the Examiner has alleged that in claims 1 and 14, the level of coverage encompassed by the phrases "substantially covers" and "substantially surrounds" is unclear. MPEP §2173.05(b) states that, "The fact that claim language, including terms of degree, may not be precise, does not automatically render the claim indefinite under 35 U.S.C. 112, second paragraph. *Seattle Box Co., v. Industrial Crating & Packing, Inc.*, 731 F.2d 818, 221 USPQ 568 (Fed. Cir. 1984). Acceptability of the claim language depends on whether one of ordinary skill in the art would understand what is claimed, in light of the

specification.” Applicants believe that a person of ordinary skill in the art would understand the coverage encompassed by the phrases in question especially when read in light of the specification. See for example, the panning operation used to coat the edible core with the soft edible layer. See paragraph [0015] of the specification.

The Examiner has alleged that in claims 10 and 14, it is unclear how yogurt and tomato sauce with their liquid-like rheological properties, can constitute an edible core with an outside surface and also how they can be coated with a base liquid. First, it appears that the Examiner is reading limitations into the claims that are not supported by the specification. Nowhere in the specification are yogurt and tomato sauce required to have “liquid-like rheological properties.” In fact, in embodiments where the edible cores are frozen prior to coating with the soft edible layer, yogurt and tomato sauce would more likely display the properties of a solid. Second, Applicants believe that a person of ordinary skill in the art would understand based on paragraph [0018] of the specification that the edible core may be a central core of liquid coated with an outer coating to hold the liquid. The central core may be further coated with more than one coating to form the edible core.

The Examiner has alleged that in claims 11 and 12, it is unclear how jelly constitutes both a base liquid and a dry component of the soft edible layer. Applicants would like to clarify that a jelly is not both a base liquid and a dry component of the soft edible layer, but that a jelly is the edible layered component that can be formed on the edible core by coating the core with a base liquid, such as, sugar solution, followed by applying a dry component, such as, pectin with or without fruits or fruit derivatives. As

described in paragraph [0008] of the specification, “The combination of the two components forms a layer of food over the edible core surface.”

The Examiner has alleged that in claim 14, it is unclear if the edible core or its outer surface is selected from the specified group. Claim 14 has been amended to clarify that the edible core is selected from the specified group. Accordingly, Applicants respectfully submit that current amendments to claim 14 render the rejection moot, and accordingly, request the withdrawal of the rejection.

In view of the foregoing amendments and remarks, Applicants respectfully submit that the indefiniteness rejections of claims 1-11 and 13-18 should be withdrawn.

The Examiner has rejected claims 1-3, 6-10, 12, 14, 16 and 18 under 35 U.S.C. §102(b) as allegedly being anticipated by *Given* et al. (U.S. Patent No. 4,888,187). The Examiner has rejected claims 4, 5, 13 and 15 under 35 U.S.C. §103(a) as allegedly being obvious over *Given* et al. The Examiner has rejected claims 11 and 17 under 35 U.S.C. §103(a) as allegedly being obvious over *Given* et al. in view of *Beharry* (PCT Publication No. WO 02/11554). The grounds of rejection are respectfully traversed.

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” MPEP § 2131 (citing *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987)). Further, “Every element of the claimed invention must be literally present, arranged as in the claim.” *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 771-72, 218 USPQ 781, 789 (Fed. Cir 1983). Consequently, unless all the

elements of rejected claim are disclosed by the cited reference, a basis for an anticipation rejection does not exist.

Independent claim 1 as currently amended, in pertinent part, is directed to a method of making a shelf stable edible snack which comprises applying on the outer surface of an edible core a soft edible layer formed of an edible layered component selected from the group consisting of peanut butter, jelly, cheese, caramel, cream cheese, cookie dough or fruit, wherein the soft edible layer has a hardness value of 6 or less as determined by Descriptive Analysis Testing in ASTM MNL13. As disclosed in paragraph [0013] of the specification, a hardness value of 6 or less means that the soft edible layer has a measurably “soft” texture as opposed to a “firm” or “hard” texture. Optionally, a drying step may be included after one or more of the steps of applying the soft edible layer.

Given is directed to a process of making a confectionery bar with a fruit core encapsulated in a caramel coating, followed by application of nuts. The nuts are embedded into the caramel coating. The full confectionery item is then coated with a compound coating, usually chocolate-flavored. *Given*, col. 3, lines 59-65. The bar is cooled to solidify the chocolate layer. *Id.* at col. 6, lines 6-8.

The Examiner equates *Given*’s caramel coating to the base liquid of the present invention and *Given*’s application of nuts to the claimed dry component. However, the caramel coating with embedded nuts of *Given* is clearly not a soft edible layer formed of an edible layered component selected from the group consisting of peanut butter, jelly, cheese, caramel, cream cheese, cookie dough or fruit as recited in the amended claims. Since *Given* fails to disclose all the claimed elements, this reference cannot support any

anticipation rejection under 35 USC § 102(b). Consequently, Applicants respectfully submit that the anticipation rejection must be withdrawn.

With regard to the obviousness rejection, *Given* does not render obvious the claims as currently amended. In fact, *Given* teaches away from a soft edible layer formed of an edible layered component such as peanut butter as presently claimed. The nut section in *Given* consists of nuts or pieces of nuts. *Given*, col. 1, lines 24-25. It is known that nuts have a hardness value well above 6 on a descriptive analysis testing scale of 1 to 15.¹ This does not disclose or suggest the soft edible layer with a hardness value of 6 or less of the present claims.

Beharry does not remedy the deficiencies of *Given*. *Beharry* is directed to snack bars having a stabilized nut spread core and a confectioner's coating based on cocoa butter or hardened vegetable oils. *Beharry*, page 8, lines 20-32. The coating is applied in the melted state by dipping, pouring, spreading or the like. Clearly, this coating is a conventional, fat-based coating, and the fact that it may be fruit flavored does not make it a jelly. Neither would it have been obvious for one skilled in the art to substitute a jelly for this confectioner's coating due to their very different compositions, physical properties, and other considerations. Finally, there is simply no disclosure or suggestion of a soft edible layer formed of an edible layered component selected from the group consisting of peanut butter, jelly, cheese, caramel, cream cheese, cookie dough or fruit as required in present claims 1 and 14 as currently amended.

¹ "ASTM Manual on Descriptive Analysis Testing for Sensory Evaluation," ASTM Manual Series: MNL 13, editor, Robert C. Hootman, Philadelphia, PA, 1992. In Chap. 4 – The Texture Profile, Pg. 40, Table 5 – Standard Hardness Scale, the hardness rating of peanuts is given as 9.5, and the hardness rating of almonds is given as 11.0.

For at least the reasons noted above, Applicants respectfully submit that *Given*, whether taken alone or in view of *Beharry* does not render obvious the above-presented claims. Applicants, therefore, respectfully request withdrawal of the § 103(a) rejections.

In view of the foregoing amendments and remarks, Applicants respectfully request that the outstanding rejections be withdrawn and that the present case be passed to issue. Should the Examiner believe that issues remain outstanding, the Examiner is respectfully requested to contact Applicants' undersigned attorney in an effort to resolve such issues and advance the case to issue.

Applicants' undersigned attorney may be reached in our New York office by telephone at (212) 218-2100. All correspondence should continue to be directed to our below listed address.

Respectfully submitted,

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